



FMLA REVISITED

The Revised Regulations and Their Implications

State of Utah
Division of Risk Management





Caveat

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Presentation Outline

- ❑ Employee Eligibility
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Employee Eligibility

- ❑ Employees must work a minimum of 12 non-consecutive months for a covered employer before they are FMLA-eligible:
 - Such employees are now eligible if they have worked 12 non-consecutive months during the past seven (7) years.
- ❑ Exceptions to the 7-year look-back:
 - When the break in service was to fulfill a military obligation.
 - When a written agreement exists that confirms the employer's intent to rehire.

Employee Notice Obligations

Foreseeable Leave:

- ❑ If 30 day notice is not practicable, the notice of the need for leave must now be given “as soon as practicable”.
- ❑ Notice need only be given once, but employee shall inform employer “as soon as practicable” if dates need to be changed or extended.
- ❑ When planning medical treatment, employee must consult with employer prior to scheduling treatment.

Employee Notice Obligations

Unforseeable Leave:

- Employee must provide notice to the employer “as soon as practicable” under the facts and circumstances of the particular case.
- Notice may be given by the employee’s spokesperson if s/he is unable to do so personally.

Employee Notice Obligations

- ❑ Employees must comply with an employer's policy and procedures on requesting leave.
- ❑ An employee seeking additional FMLA leave must inform employer of previous leave or condition.
- ❑ The employer must inquire sufficiently to determine if the employee is requesting FMLA leave.



Employee Notice Obligations

- ❑ Employee must provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request.
- ❑ Employer can require medical certification or certification to support a qualifying exigency leave.
- ❑ Employee must respond to employer's questions that are designed to qualify his/her request for FMLA leave.



Employer Notice Obligations

- ❑ The new rules consolidate the employer notice requirements.
- ❑ Three employer notices are required, instead of two.



Poster/General Notice

Employers have an obligation to post the notice.

- May be electronically posted.
- Employer must give the general notice to each new employee at the time of hire.



Notice of Eligibility

Employers now have up to **5 business days** to notify the employee of his/her **eligibility** to take FMLA leave.

Notice of Eligibility

- ❑ May be verbal or written.
- ❑ Must state whether the employee is eligible and, IF NOT, give at least one reason why.
- ❑ **Must be in the employee's language.**
- ❑ No new notices needed for subsequent FMLA leave if eligibility has not changed.



Rights and Responsibilities Notice

- ❑ Employer must provide notice of the specific expectations and obligations of the employee.
- ❑ If any of the specific information changes, the employer must give notice of the changes within 5 business days.

Designation Notice

- ❑ Employer must designate the leave in writing as FMLA leave within 5 business days of receiving enough information to determine if qualified. If the leave is not designated as FMLA, the notice may be given in a simple written statement.
- ❑ Only one notice if designation is needed for each FMLA qualified reason per applicable 12 month period.

Designation Notice (cont.)

- ❑ If a fitness for duty certification will be required before reinstatement, the employee must be informed (in writing) when the designation notice is given.
- ❑ Must include language about requirements on paid leave plans.

Designation Notice (cont.)

- ❑ The employer must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement.
- ❑ The decision to designate the leave as FMLA must be based only on information provided by the employee or his/her spokesperson.
- ❑ The employer may retroactively designate the leave as FMLA.



Medical Certification

- ☐ Date condition commenced?
- ☐ Probable duration of condition?
- ☐ Date(s) of treatment?
- ☐ At least two (2) treatment visits/year?
- ☐ Was medication prescribed?
- ☐ Referral to other health care providers?
- ☐ What job functions can't patient perform?

Medical Certification (cont.)

- ❑ Symptoms, diagnosis, regimen of continuing treatment (specialized equipment)?
- ❑ Period of incapacity?
- ❑ Follow-treatment appointments/treatment schedule/reduced schedule?
- ❑ Episodic flare-ups and effects on ability to work?
- ❑ Frequency of flare-ups and duration of incapacity?

Medical Certification (cont.)

- ❑ Authentication/validation
 - Employer now permitted to have direct contact with employee's health care provider.
- ❑ Clarification/meaning
 - With employee's permission, employer's health care practitioner, HR professional, leave administrator, or management official may contact employee's health care provider.
 - Direct supervisor contact specifically excluded.

Medical Certification (cont.)

- Employers should request employees to provide certification
 - Foreseeable Leave: when notice of need for leave is given or within 5 business days of the request for leave
 - Unforeseeable Leave: within 5 business days after leave begins
- Employer may require certification within 15 days if it subsequently questions the appropriateness or duration of leave.

Medical Certification (cont.)

- Employers can require completeness and sufficiency of information
 - Certification is incomplete if one or more of applicable entries not completed
 - Certification is insufficient if the information is vague, ambiguous or non-responsive

Medical Certification (cont.)

- Employee must be notified in writing of incompleteness or insufficiency
 - Written notice must advise employee what information is needed to cure deficiencies
 - Employees have 7 calendar days to cure deficiencies, unless not practicable
- If deficiencies are not cured, or certification is not provided, leave may be denied.

Medical Certification (cont.)

- When requesting certification, employer must inform employee of consequences of failing to provide adequate certification.
- **Employee must furnish complete/sufficient certification OR to furnish his/her health care provider with authorization to release complete/sufficient certification directly to the employer.**

Medical Certification (cont.)

- ❑ Employees can be required to provide translation of certifications prepared by foreign medical providers.
- ❑ Employees' family members are acceptable translators.

Medical Certification (cont.)

- ❑ Contact between employer and employee's health care provider must comply with HIPAA's Privacy Rule.
- ❑ If employee fails to give HIPAA authorization, s/he may jeopardize right to FMLA leave if information provided is insufficient or incomplete.
- ❑ DOL rejected requirement that employees must sign a release as part of the medical certification.

Medical Certification (cont.)

- Two new optional forms
 - Self-care (Form WH-380E)
 - Family-care (Form WH-380F)
- Health care providers must certify that intermittent/reduced schedule leave is medically necessary.
- When serious health condition may also be “disability” employer may follow ADA’s procedures for requesting documentation.

Medical Certification (cont.)

- ❑ Recertification may be required every 30 days only in connection with absence
 - Pregnancy, chronic or long-term conditions
 - Exceptions: significant change of circumstances or suspected fraud
- ❑ If minimum duration of incapacity is specified, employer may not request certification until that time period has expired.
- ❑ Six-month recertification permissible in all circumstances.

Medical Certification (cont.)

- Recertification may be requested in less than 30 days if
 - Employee requests extension of leave
 - Significant change of circumstances
 - Reasonable doubts about reason for employee absence (Monday/Friday absences)
- If recertification not provided within 15 days of request (or as soon as practicable) employer may deny continuation of leave.

Serious Health Condition - Same

- ❑ Illness, injury, impairment (physical or mental) that involves inpatient care or continuing treatment.
- ❑ Period of incapacity of more than three consecutive calendar days and one visit to a health care provider with a regimen of continuing treatment, such as prescription, or two visits to a health care provider.

Serious Health Condition - New

- The 2 visits to the health care provider must occur within 30 days of the commencement of the period of incapacity.
 - The first visit must occur within 7 days of the first day of incapacity.
- **Extenuating Circumstances Rule**
- Added “physician’s assistant” to definition of health care provider.

Serious Health Condition (cont.)

- Permanent/Long-Term Conditions (same)
 - Requires continuing supervision of health care provider, i.e., Alzheimer's
 - Does not require proof of active treatment
- Conditions Requiring Multiple Treatments
 - Treatments, recovery time, likely to result in period of incapacity > 3 consecutive, **FULL** calendar days without medical intervention or treatment (chemotherapy, dialysis)

Serious Health Condition (cont.)

- ❑ Chronic Health Conditions
 - Periodic visits – “at least twice a year” (new)
 - Continue over extended period of time
 - May cause episodic incapacity, i.e., asthma, diabetes, epilepsy
 - Covered even if employee/family member does not receive treatment during the absence
 - Covered even if absence not >three consecutive, full calendar days

Intermittent Leave

- ❑ FMLA leave may be taken “intermittently or on a reduced leave schedule” for qualifying reasons, including providing care and comfort to a covered family
- ❑ Intermittent leave may be used occasionally or in a block of time not to exceed six months.
- ❑ Intermittent leave is protected leave only while the person is incapacitated.

Intermittent Leave (cont.)

- ❑ Intermittent leave is most commonly used for conditions which are episodic, not continuous, and generally don't require medical attention for every absence.
- ❑ Under new regulations, at least two medical visits per year are required for chronic conditions.
- ❑ Intermittent or reduced schedule leave may be used for self, family or servicemember.
- ❑ After the birth of a healthy baby intermittent leave may be used only if employer agrees.

Intermittent Leave (cont.)

- ❑ Employers may count the entire period of time an employee is forced to be absent by the physical impossibility of rejoining/leaving work.
- ❑ Employers may NOT charge employees for periods of time they are working.
- ❑ The statute permits an employee to “substitute” paid leave for otherwise unpaid FMLA leave and also permits an employers to require this “substitution”. The paid time “substituted” counts against the employee’s FMLA entitlement.

Intermittent Leave (cont.)

- ❑ Recertification can be required as often as every 30 days if there is reason to question the use of leave, if there is a substantial change in the person's health condition, or if the leave taken is different than the original certification.
- ❑ A new certification can be required each year for ongoing illnesses.

Intermittent Leave (cont.)

- ❑ Employees on intermittent leave must comply with call-in procedures. They may be required to call at the beginning of each shift and speak to a particular person, absent other arrangements.
- ❑ Employers do not have to accept email or voice mail notification before or after the shift starting time unless there is a situation that prohibits the employee from providing the required notification.
- ❑ Document any violations of call-in procedures.

Intermittent Leave (cont.)

- ❑ Each time an employee requests intermittent leave, and the request is substantiated by the original medical certification, provide notice that s/he is eligible for leave and that related absences will be charged against FMLA.
- ❑ Employers may explain the hardships created when the employee is absent due to unplanned intermittent leave.

Intermittent Leave (cont.)

- ❑ Employees must make a “reasonable effort” to schedule such leave so as not to disrupt unduly the employer’s operations.
- ❑ Temporary transfers are allowed for employees taking **planned** intermittent leave only.
- ❑ Accounting for leave need not be in the smallest increments that the employer’s timekeeping system can handle, but in the smallest increments the employer uses in other types of leave, provided it is not greater than one hour.

Fitness for Duty Certification

- ❑ Must be a uniformly applied policy or practice.
- ❑ Employees must provide certification OR authorization for health care provider to provide information directly to employer.
- ❑ Must be job-related and consistent with business necessity/limited to relevant health condition.
- ❑ Employer may provide list of essential job functions—**this list must be provided contemporaneous with Eligibility Notice.**

Fitness for Duty Certification (cont.)

- ❑ Employer may contact health care provider for authentication and clarification.
- ❑ Employer may not delay employee's return to work while contacting health care provider for clarification/authentication.
- ❑ No second or third opinions may be required.

Fitness for Duty Certification (cont.)

- Employers are not entitled to fitness for duty certifications for intermittent or reduced schedule leave, unless
 - reasonable safety concerns exist, based upon the employee's serious health condition, then
 - employer may request fitness for duty certification up to once every 30 days.

Light Duty - New

- ❑ Interplay of available light duty, workers comp benefits, and FMLA.
- ❑ NEW: 12-week (480-hour) FMLA leave benefit is not diminished by time spent in light duty position, because the employee is working.
- ❑ Employers may impose time limits on light duty assignments.

Substitution of Paid Leave

- ❑ Original regulations prohibited employers from restricting substitution of paid vacation or personal leave.
- ❑ NEW: Employers may now apply their normal leave policies to the substitution of all types of paid leave for unpaid FMLA leave.
- ❑ NEW: Employers must notify employees of additional requirements for use of paid leave.

Substitution of Paid Leave (cont.)

- Examples:
 - Employees must use paid leave full-day increments
 - Employees must submit a specific leave request form
 - Paid sick leave available only for specific family members or employee's own illness
- Such policies must be uniformly and consistently applied.

Holidays/Waiver of Rights - New

- ❑ If employee needs less than a full week of FMLA leave, the holiday hours that the employee would not otherwise be required to work, cannot be counted against the FMLA leave entitlement.
- ❑ Employees can settle or waive FMLA claims based upon past employer conduct without court or DOL approval.



Military Family and Caregiver Leave

THEN

- ❑ No provision for protected leave to care for a servicemember or to deal with an exigency arising out of a call to duty.

NOW

- ❑ Two new sections added that deal exclusively with servicemember-related leave.

Servicemember Leave

- ❑ Up to 26 weeks caregiver leave for eligible employees to care for a covered military member with a serious injury or illness incurred in the line of duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating.
- ❑ Up to 12 weeks family leave for eligible employees because of any qualifying exigency arising out of a covered servicemember's call to duty.



Military Caregiver Leave

An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for a servicemember with a serious injury or illness.

Military Caregiver Leave (cont.)

Clarifications:

- ❑ Son or daughter must be 18 years of age or older.
- ❑ “Next of Kin” is defined as the servicemember’s nearest blood relative. The regulations allow a servicemember to designate a blood relative, other than those specifically mentioned, as his or her nearest blood relative. Once the servicemember designates, that individual will be the servicemember’s **ONLY** next of kin.

Military Caregiver Leave (cont.)

- ❑ Covered Servicemember: A current member of the Armed Forces (includes National Guard or Reserves), or a member of the above-named services on the temporary disability retired list, in outpatient status.
- ❑ Not a Covered Servicemember: A former member of the Armed Forces, National Guard or Reserves or one who is on the permanent disability retired list.

Military Caregiver Leave (cont.)

- ❑ The leave year is based on a single 12-month period and begins with the first day the employee takes leave. This differs from how a leave year is computed for all other forms of FMLA-qualified leave, including exigency leave.
- ❑ No more than 26 weeks of leave may be taken during any single 12-month period.
- ❑ The leave is applied on a per-covered-servicemember, per-injury basis.
- ❑ Unused servicemember leave at the end of the single 12-month period is forfeited.

Military Caregiver Leave (cont.)

- ❑ Employer must designate leave as servicemember leave when leave qualifies both under this provision and the provision for leave to care for a family member with a serious health condition.
- ❑ A separate certification form-(Form WH-385) may be used.
- ❑ Employers may request certification from the servicemember's authorized health care provider (HCP).

Military Caregiver Leave (cont.)

Certification Requirements:

- ❑ Authorized HCP: US DOD HCP, US Department of Veterans Affairs HCP, DOD TRICARE authorized private HCP, and DOD non-network TRICARE authorized private HCP.
- ❑ Employer may seek authentication and clarification.
- ❑ 2nd and 3rd opinions are not permitted.

Military Caregiver Leave (cont.)

- ❑ Confirmation of a covered family relationship to the seriously injured or ill servicemember is allowed.
- ❑ Trumping the need for certification forms are invitational travel authorizations (ITAs) issued to any family member to join an injured or ill servicemember.

Qualifying Exigency Leave

- ❑ Eligible employees may take FMLA leave for “any qualifying exigency...arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.”
- ❑ Does not apply to family members of military members who are in the regular armed forces or to retired members of a state Reserve or National Guard unit.

Qualifying Exigency Leave (cont.)

A Qualifying Exigency includes:

- ☐ Short-notice deployment
- ☐ Military and activities related to call to active duty
- ☐ Childcare and school activities
- ☐ Financial and legal arrangements
- ☐ Counseling
- ☐ Rest and recuperation
- ☐ Post-deployment activities
- ☐ Additional activities-agreed to by both employer and employee

Qualifying Exigency Leave (cont.)

- ❑ The leave year is based on a 12-month period and can be designated by the employer. The employer's standard leave year applies to this type of leave.
- ❑ A separate certification form must be used: Certification for Qualifying Exigency for Military Family Leave (Form WH -384).

Qualifying Exigency Leave (cont.)

- Employers can ask for
 - Copies of duty orders or other documentation
 - Facts about the exigency
 - Dates of the military member's active duty
 - Date of exigency's commencement
- Copies of active duty orders must only be provided once.



Questions
